No. 2465

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD SILVAS, an Infant, by RAMON SILVAS, his Guardian ad litem,

Plaintiff in Error.

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,

Defendant in Error.

Brief of Plaintiff in Error

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BRIEF OF PLAINTIFF IN ERROR.

THIS CAUSE IS HERE ON A WRIT OF ERROR DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA TO REVIEW A FINAL JUDGMENT DISMISSING THE PLAINTIFF'S COMPLAINT FOR FAILURE TO FILE AS DIRECTED BY THE COURT BELOW A BOND FOR SECURITY FOR COSTS.

The action was brought in behalf of the infant plaintiff by his guardian ad litem to recover damages for personal injuries received by the infant and resulting from the negligence of the defendant.

The sole basis of Federal jurisdiction in this case is that it presents a controversy in which the requisite amount is involved and one which is between a citizen of the State of Arizona and a corporate alien.

While the cause was pending in the court below and before a trial thereof, the defendant in error moved that plaintiff be required to give security for costs upon the ground that neither the infant nor his guardian ad litem are the owners of property out of which costs could be made on execution sale.

In response to this motion, after withdrawing proof of the plaintiff's poverty and inability to give the desired security, which had previously been filed in opposition to the motion, the plaintiff especially set up and claimed an exemption from the provisions of the state statutes of Arizona (paragraph 643 Civil Code Ariz. 1913) relating to security for costs. This exemption is in favor, among others, of guardians and is found in what is now paragraph 64[illegible] of the Civil Code of Arizona, 1913.

The motion was heard on January 21, 1914, and was thereupon submitted to the court, and on March 12, 1914, the court granted the defendant's motion and directed plaintiff to file a cost bond in the sum of two hundred and fifty ($250) dollars.

The plaintiff failed to file the bond and thereafter a final judgment dismissing the complaint because of such failure was entered.

It is to review and to reverse this judgment that this writ is prosecuted.

POINT I.

The judgment dismissing the action for failure to give security for costs was erroneous.

The assignment of errors presents for determination the question whether a guardian who brings a suit on the law side of the Federal Court in the District of Arizona may lawfully be required to give security for costs because the plaintiff is not the owner of property out of which costs could be made by execution sale.

We will urge upon the court the negative of this proposition and will show that the defendant in this case was not entitled to security for costs from the plaintiff, that the order which required the plaintiff to give such security was erroneous and that the judgment of dismissal, based upon it and upon the plaintiff's failure to give the bond required, should be reversed.

The right to security for costs is wholly statutory.

> Re Grade Crossing Comm., 46 N. Y. Supp. 1070-1071, 20 App. Div. 271.
>
> Patterson vs. Burnett, 4 N. Y. Suppl. 921.
>
> Republic of Honduras vs. Soto, 112 N. Y. 310, 313.

Without the existence of statutory authority the Federal Court upon its law side has no inherent or discretionary power to require the giving of security for costs from one litigant to another.

There is no federal statute upon the subject.

There is a federal statute known as the Federal Paupers' Act (Act of Congress, July 20, 1892, 27 statutes at large, 252, Fed. Stat. Anno. Vol. 2, p. 294) which is as follows:

"Section 1. That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Section 2. That after any such suit or action shall have been brought, or that is now pending, the palintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Section 3. That the officers of court shall issue, serve all provess, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Section 4. That the court may request any attorney of the court to represent such poor person, if it

deems the cause worthy of trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Section 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, that the United States shall not be liable for any of the costs thus incurred."

This statute, as is obvious from an inspection of it, relates to the subject of pauperism in its relation to the maintenance of litigation in the Federal Courts and in no way tends to prescribe upon what conditions or under what circumstances security for the payment of costs may be required in the Federal Courts of litigants who are not paupers.

The Federal Courts have uniformly applied the statutes of the several states upon the subject of security for costs to motions on the law side of the Federal Courts in the respective states. And this has been done under and by virtue of a proper application of Section 914 of the United States Revised Statutes.

Huginin vs. Thatcher, 18 Fed. 105.

Miller Adv. vs. Norfolk & W. R. Co., 47 Fed. 264.

O'Brien vs. Hearn, 125 Fed. 95.

Scoffield vs. Palmer, 134 Fed. 74.

Winkley Co. vs. Bowen Mfg. Co., 185 Fed. 624.

Michigan Aluminum F. Co. vs. Aluminum Co. of America, 190 Fed. 913.

The subject of security for costs in the State of Arizona is regulated by Chapter 24, Title 6, of the Code of Civil Procedure of Arizona, 1913, paragraphs 643 to 650, inclusive. Paragraph 643 provides:

> "643. At any time before trial on motion of the defendant, supported by affidavit showing that the plaintiff is a non-resident of the state or that plaintiff is not the owner of property out of which the costs could be made by execution sale, the court shall order the plaintiff to give security for the costs; and if the plaintiff fail so to do within ten days next after the order is made, the case shall stand dismissed."

Paragraph 646 of the same Code is as follows:

> "646. Neither the state, nor any county thereof, nor any state board or commission or state officer in his official capacity nor any executor, administrator or guardian, appointed under the laws of this state, nor any trustee in bankruptcy shall be required in any case to give security for costs."

The plaintiff contended below and contends here that he is entitled to the exemption created by paragraph 646 of the Arizona Cade, in favor of guardians, and that the Court had no power to require the plaintiff to give security in this case.

Obviously, the only basis for granting the motion is paragraph 643 of the Arizona Code which creates the right in the cases specified. But this statute is expressly

controlled by the exemptions and exceptions contained in paragraph 646 of the same code. The plaintiff was within one of the exempted classes, and especially set up and claimed his exemption which, notwithstanding this, was denied to him.

An analysis of the opinion of the learned court below shows that it is based upon several fundamental errors.

Thus the learned court was of the opinion (A) that it was required to decide whether the Federal Paupers' Act or the exemption created by paragraph 646 of the state statute should control and regulate the decision of the motion.

The determination of this question was approached by a discussion of the well recognized and indisputable principle that when Congress has legislated upon a subject no state legislature may occupy the same field, and by a full discussion of the authorities which indisputably hold that one who seeks the benefits of the Federal Paupers' Act must show not only his own poverty and inability to pay costs, but the inability of all those contingently interested with him in the subject matter as well. And the conclusion (B) was reached that paragraph 646 of the state statute did assume to occupy the same field of legislative activity already occupied by Congress as disclosed by the Federal Paupers' Act. And (C), that failure to comply with the Federal Paupers' Act must

result in the imposition of security for costs as prayed for by the defendant, that the existence of the Federal Pauper's Act prevented the application of paragraph 646 of the state statute to the motion, and because of plaintiff's admitted failure to bring himself within the provisions of the Federal Pauper's Act, the motion for security was granted.

But (A) the question erected by the learned court for determination was not determinative of the motion before it.

It was not the real question before the court for decision. In reality, it was purely fanciful and had no relevancy to the issue.

Paragraph 646 was in reality a part of paragraph 643 of the same code. It created the exceptions to the rule promulgated by paragraph 643. Neither paragraph is complete without the other. Neither can be construed properly alone.

Paragraph 646 was a mere proviso to paragraph 643. Paragraph 646 is an integral and inseparable part of paragraph 643.

This exemption created a statutory right in favor of the plaintiff which it was the duty of the court to recognize and enforce, just as it is the duty of Federal Courts to give effect to other state statutes which create rights, when not in conflict with Congressional legislation.

Darrah vs. Wetter Mfg. Co., 78 Fed. 7.

Harrison vs. Remington Paper Co., 140 Fed. 385.

Lillieanthal vs. Drucklieb, 80 Fed. 562.

If there was any question of possible conflict between the state statute and the Federal Paupers' Act, it was the question whether paragraphs 643 and 646 together were in conflict with the Act of Congress.

The real question was the defendant's right to security for costs upon the ground urged.

This alleged right should have been denied, because the right to security is purely statutory. The right claimed is not derived from any federal statute. If it exists at all, it exists only because of paragraph 643 of the State Code, which is qualified by the exemption contained in paragraph 646 of the same statute, which expressly exempted the plaintiff from the operation of paragraph 643.

We do not dispute that when Congress legislates generally upon any subject within the sphere of its authority, it thereby preempts that field of legislation and no state legislature may occupy the same field thereafter.

Nor do we dispute the rule announced in the authorities cited by the learned court below, that a litigant who seeks to avail himself of the benefits of the Federal Paupers' Act must show the inability of those contingently interested with him in the litigation, as well as his own inability to pay the costs imposed by statute.

But we do dispute the applicability of either principle to the matter before the court.

(B) There was no conflict between paragraph 646 of the Federal Paupers' Act nor between paragraphs 643 and 646 of the Arizona Code and the Act of Congress.

The subject upon which Congress legislated when it enacted the Paupers' Act was who might sue as paupers, and of course those who might sue as such could not be required either to pay or give security for the payment of the fees imposed by law upon others.

The subject was who were paupers within the Act, not the grounds upon which those who were not paupers might be required to give security for costs.

Consequently, the only legislative field occupied by Congress by the enactment of this statute was the creation of a class of statutory paupers, namely, the persons therein specified and those whom the courts construe to be within the purview of that statute.

The exemption from the payment of costs was a mere incident to the right of paupership, and Congress did not assume to legislate generally upon the subject of security for costs, nor did it create an exclusive class from whom costs could not lawfully be ~~enacted~~ exacted, in the Federal Courts.

Nor did the state attempt by paragraph 643 or 646,

or both, to enter the same legislative demain already occupied by Congress by the enactment of the Paupers' Act.

The state dealt with the right to sue in *forma pauperis* by another statute, namely, paragraph 645 of the Arizona Code, and in so far as a plaintiff on the law side of the Federal Court might seek to avail himself of the provisions of paragraph 645 of the Arizona Cade, to avoid a compliance with the Federal Pauper's Act, such statute would clearly be inapplicable in the Federal Courts.

But no attempt was or is made by the plaintiff in this case either to avail himself of the provisions of paragraph 645 of the Arizona Code or of the provisions of the Federal Paupers' Act.

But if, as asserted by the learned court below, paragraph 646 does conflict with the Federal Paupers' Act, upon what ground can the motion for security properly have been granted?

As we have shown, the alleged right to security is dependent upon the state statute, and paragraph 646 is only a part of paragraph 643, and both must be read together as one statute.

If for any cause the state statute is inapplicable to the defendant's motion for security, whence comes the power of the court to grant the motion?

Moreover, on the second branch of this discussion

(C), namely, the failure of the plaintiff to bring himself within the Federal Pauper's Act, the matter decided by the learned court below was not before the court for determination.

The failure of the plaintiff to bring himself within the Federal statute is admitted.

The affidavit of poverty submitted by the plaintiff in the first instance was expressly withdrawn from the learned court's consideration. No reliance was placed upon nor was any benefit sought from the Federal Paupers' Act. There was no application before the court for leave to sue in *forma pauperis*.

Nevertheless, the questions which would have been involved, had reliance been placed upon this statute, were decided by the learned court lest, as the court expressed it in substance, they might subsequently be presented for determination.

It seems inevitable that an erroneous conclusion should have resulted from such faulty premises, and we respectfully submit that the conclusion reached by the learned court was erroneous.

It was erroneous because assuming the valid applicability of the paragraph 643 to the motion and that the court properly, though unconsciously, gave that paragraph force and effect in granting the motion, nevertheless the court separated from it paragraph 646, which in reality is an integral and inseparable part of it, and

then erroneously held paragraph 646 to be in conflict with the Federal Pauper's Act, and moreover granted the motion, although a logical pursuit of the court's reasoning shows that if paragraph 646 was invalid in its application to the Federal Court because of conflict with the Federal Paupers' Act, being in reality only a part of paragraph 643 from which the only claim of right to security flows, paragraph 643 would also be in conflict with the Federal Act, and hence the only authority to grant the motion is by the court's own process of reasoning swept away.

But finally the result was erroneous because it afforded to one litigant the benefits of the state statute and denied its benefits to another.

The defendant was allowed to obtain security for costs under paragraph 643 of the Arizona Code, while the plaintiff was denied the exemption contained in paragraph 646 of the same statute.

In other words, it was decided that the defendant was entitled to the benefits of this statute, but that the plaintiff was not.

We do not know to what this remarkable elasticity in interpretation is attributable.

We know of no authority for it.

We are unable to perceive or recognize any principle of logic or reason from which it springs or by

which it may be supported. We are unable to reconcile its striking and apparent inconsistencies.

We are led to the irresistible conclusion that no reasonable basis for it exists.

We think plain error was committed in the ruling that gave to the defendant something to which, as we have shown, it was not entitled. The effect of the ruling was to drive from a national court a litigant who claimed his right to litigate there his controversy with a subject of a foreign country found within the state, rather than in a court of the state in the county in which the defendant had its principal place of business.

The decisions which comment on the reasons why Congress conferred upon the citizens of the several states the right to select a Federal forum for the determination of their disputes with citizens of different states, show that such a privilege was and is a fundamental right which no Federal court may deny to any litigant entitled to it.

The effect of the ruling complained of was to deny this right to the plaintiff, who was, as we have shown, entitled to it.

Since the defendant was not entitled to security for costs, the order requiring the plaintiff to give security was erroneous and the judgment of dismissal based upon it should be reversed with costs.

But there is another aspect of the case which appeals strongly to us and a further reason why the motion for security should have been denied.

The application of state statutes upon the subject of security for costs in the Federal Court is obviously subject to the qualification that if a particular statute in effect imposes upon a litigant a condition precedent to his right to sue in a national court, which condition is not imposed upon him by Congress, the state statute to that extent may not be applied to proceedings in the Federal Court, because no state is competent to limit or in any way to restrict the rights conferred upon citizens by Congress to have free access to the courts of the nation and to litigate in those courts their controversies, subject only to the provisions of the Federal statutes.

We are not concerned in this instance with the provision of paragraph 643, so common in the statutes of other states, which requires security for costs of a non-resident plaintiff, but with the provision that, if the plaintiff is not the owner of property out of which the costs could be made on execution sale, the court shall order the plaintiff to give security for costs, we are concerned.

We think this provision of the statute may not lawfully be applied to actions in the Federal Court for the reason suggested.

We think such an application of the statute clearly

imposes a property qualification upon the right to maintain litigation in the Federal Court foreign to any act of Congress.

Congress authorized a plaintiff to file and maintain his suit in a Federal Court in any case in which the matter in controversy exceeds in value, exclusive of interest and costs, the sum of three thousand ($3,000) dollars and is between citizens of different states or citizens of a state and aliens.

Congress did not add the proviso that if the plaintiff is not the owner of property out of which costs could be made on execution sale, the court should have power to require the plaintiff to give security for costs as a condition precedent to the maintenance of litigation by such a litigant. If such a proviso is applicable to the Federal Courts, then an additional prerequisite to the right to maintain suits in such court is created not by Congress but by the legislature of a state. The mere fact that plaintiff had no property out of which costs could be made on execution sale would not have entitled him to sue as a pauper in the Federal Court. To avail himself of the paupers' act, he must not only establish his own poverty and inability to pay costs, but also that all those having an interest in the subject matter of the litigation are likewise unable to give security for costs, and he must comply with the other expressed provisions of the paupers' act.

Boyle vs. Great No. Railway Co., 63 Fed. 539.

Feil vs. Wabash R. R. Co., 119 Fed. 490.

Reed vs. Pa. Co., 111 Fed. 714.

Phillips vs. Louisville and N. R. Co., 153 Fed. 795.

Consequently, to apply the provision of paragraph 643 of the Arizona Code to the Federal Courts is simply to impose a property qualification upon the right to sue in the Federal Court, which is unauthorized and which no state legislature has the power or authority to impose upon those lawfully litigating their controversies in the Federal Court.

A great variety of statutes of the several states, which have directly or indirectly sought to embarrass the institution and maintenance of litigation in the Federal Courts, have uniformly been held by Federal Courts to be wholly inapplicable to the Federal Courts.

Their invalidity when applied to Federal Courts has been repeatedly recognized.

Barber Asphalt Paving Co. vs. Morris, 132 Fed. 945.

Clark vs. Bever, 139 U. S. 96-102.

Tullock vs. Mulvane, 184 U. S. 497.

Ins. Co. vs. Morse, 20 Wall. 445.

Harrison vs. St. Louis, etc., R. Co., 232 U. S. 318.

Mo. Pac. R. Co. vs. Larabee, 34 Sup. Ct. Rep. 979, 984.

In the case last cited a state statute, which assumed to authorize the recovery in a state court of costs by way of compensation for services rendered by attorneys in the prosecution of mandamus proceedings before the Supreme Court of the United States, was held to be unenforceable in the Federal Courts, among other reasons because such a statute imposed a burden upon litigants in the Federal Courts which the state legislature was without power to impose.

So in Barber Asphalt Paving Co. vs. Morris, 132 Fed 945, Judge Sanborn said:

> "Whenever the citizens of a state may secure a trial and decision of their controversies in its courts either by original suits, by appeals or by other proceedings, citizens of different states have the right to the determination by the courts of the United States of like controversies between them which involve the requisite amount; and no state by conferring exclusive jurisdiction of such controversies upon its own courts, by prescribing exclusive methods of commencing litigation, by prohibiting the payment of claims save upon the order of its own courts or by any other means, may strike down that right or take away the plenary power of the national courts to enforce their lawful adjudications."
>
> (Citing many authorities.)

In this case a provision of a city charter which prohibited officers of the city from paying the claim of the claimant pending appeal without the order of the state court was held not to impair in any way the jurisdic-

tion of the Federal Court to proceed to trial and to enforce any judgment it might render in the premises.

In other words, the complete inapplicability of that particular state statute to proceedings in the Federal Court was recognized and adjudicated.

Bever vs. Clark, 139 U. S. 96, 102, involved the familiar discussion of the right of citizens of different states to litigate in the National Courts a claim against a decedent's estate when the state legislature had declared that the probate courts of its state should have exclusive jurisdiction of such suits.

It was held that these provisions of the state statute were wholly inapplicable to the Federal Courts.

In other words, such statutes are inoperative when attempted to be applied to proceedings in the Federal Courts, and the Federal Courts have uniformly nullified such statutes in their application to such courts.

Tullock vs. Mulvane, 184 U. S. 497, holds that attorneys' fees are improperly included as damages recoverable for the breach of an injunction bond given in a Federal Court, notwithstanding the existence of a state statute which authorizes the recovery of such fees as damages in such cases.

And in Insurance Co. vs. Morse, 20 Wall. 445, the Court held that a state statute which required foreign insurance companies desiring to transact business in the

state to agree not to remove suits against it to the Federal Court, obstructed the right of free access to the Federal Courts conferred by the Constitution of the United States, and hence was void.

In principle, we are unable to distinguish the cases to which we have directed attention and the many cases cited in these authorities from the case at bar. In the case at bar the application of the state statute to proceedings on the law side of the Federal Court supplies and affords a means of ousting litigants, who are otherwise qualified to maintain their suit in the Federal Court, from the courts of the nation. And this means is created not by act of Congress but by a mere state legislature. Indeed, the application of this statute to the Federal Court creates a special class of litigants in Arizona who may not have their controversies with citizens of other states determined by the Federal Court in that district. A litigant might well not be possessed of tangible property out of which costs of the litigation might be made on execution sale and yet not be a pauper within the meaning of the Federal Pauper's Act. Such a litigant would be unable to avail himself of the provisions of the Pauper's Act. Such a litigant, not having property out of which costs could be made on execution sale, might well be wholly unable to give security for costs, and upon such failure he is deprived of his right to litigate his controversy in the national courts.

Suppose for the sake of illustration that the state

statute had provided that no one should maintain litigation in the courts of the state unless he had on deposit within the county the sum of five thousand ($5,000) dollars. Would any one seriously contend that such a statute could be applied under the Conformity Act to proceedings in the Federal Court of that district? And if so applied, is there any possibility that such an application of the Conformity Act would be sustained? It may be said in response to this illustration that such a requirement would be clearly unreasonable, and for that reason the Federal Courts would decline to follow and adopt the state statute. But we respectfully submit that the test of applicability of a state statute to proceedings in the Federal Court, when that statute assumes to regulate and to prescribe conditions upon the performance of which alone, litigation may be maintained in the state court, does not depend upon the reasonableness of such state legislation, but upon the total absence of power in the state legislature to deal with such a subject in its application to the Federal Courts.

It is clear from a reading of the Paupers' Act that Congress merely wished to assure to paupers in every state the right of free access to the Federal Court. It did not care to have the right of this class, as the rights of other litigants are, dependent upon state statutes, made applicable to the Federal Court by the Conformity Act. The subject of the act was the rights of paupers, not the rights of those who were not paupers.

But it is also clear that Congress did not intend that the rule of statutory construction *"Expressio unius est exclusio alterius"* should be applied to it.

Because it exempts paupers it did not prohibit the existence of other exemptions found in state statutes made applicable by the Conformity Act in favor of those who were not paupers, nor did it render legislation by it unnecessary when it determined that it wished to exempt other classes not specified in the Paupers' Act.

For example, the exemption created by Sec. 1001 of the U. S. R. S. in favor of Federal officers who institute suits pursuant to instructions from the department of justice.

The rule of construction is inapplicable. If it were applicable the passage of Sec. 1001 would have been unnecessary.

But it may be suggested that if this reasoning be sound it would apply with equal force to that part of the statute which permits the imposition of costs upon a non-resident plaintiff. It will be pointed out that since the earliest time, at least since 1792, the right of the Federal Courts to require security of non-resident plaintiffs has been evidenced by repeated instances of its enforcement, and today it will be said that the right is further guaranteed by the rule of the District Court (Rule 77), which expressly provides that non-residents shall be required to give security.

We wish to meet the argument upon the merits.

We say we are unable to distinguish in principle between the requirement of security because of non-residence or because of lack of property, except that the right to require security of a non-resident plaintiff, whether at law or in equity, seems to exist here as in England without any statute or rule of court as a part of the common law. (11 Cyc 171.)

Indeed, we are quite unable to see how a state statute imposing upon non-residents the burden of supplying security for costs with the penalty of dismissal for failing to give it even when fortified with a court rule to the same effect, can be applied to the Federal Court without embarrassing the maintenance of litigation in that court to that extent. So far as the court rule is concerned the power to make such rules, while doubtless inherent to some extent, is derived from Sec. 918 of the Revised Statutes.

But even this authority is to be exercised in conjunction with a proper observance of the Conformity Act and we do not understand that by a mere court rule the court could nullify the provisions of the Conformity Act and by so doing make rules for the guidance of practice and procedure on the law side of the court contrary to the state statutes which are applicable under the Conformity Statute.

Importers and Traders Natl. Bank vs. Lyons,
134 Fed. 510.

So far as the state statute is concerned, when applied in the Federal Court logically, we think it imposes a clear embarrassment and impediment to the maintenance of litigation in the Federal Courts not authorized by Congress, but in reality in conflict with the provisions of the Judicial Code.

Section 51 of the Judicial Code expressly authorizes the institution of suits in the district of the residence of the defendants by non-resident plaintiffs. It imposes no proviso that the plaintiff shall upon request file security and in default thereof shall be dismissed.

In Woods vs. Bailey, 111 Fed. 121, the point suggested itself to Judge Archibald who said, "It does not seem altogether consistent with the statutes which give jurisdiction on the ground of diverse citizenship, but the point is not raised and I do not pass upon it."

It was considered in Miller's Administrators, 47 Fed. 264, but we respectfully submit the decision against the contention is poorly reasoned.

The fears there expressed that unless security was required the public officers would go unpaid is wholly without foundation. The Federal statutes expressly provide that the officers of the court need not render any statutory service until their lawful fees are tendered to them—a practice which is uniformly followed in this jurisdiction with sedulous fidelity. Nor would the litigant be remediless as the corut supposed in such a case.

The ancillary jurisdiction of the equity side of the court is always open to litigants oppressed by any of the rigors and hardships of the common law and an injunction to restrain the prosecution of an action at law, if vexatiously brought or if maintained at needless or extravagant expense to the defendant without probable hope of success on the part of the plaintiff, would present a proper basis for the exercise of a judicial discretion not vested in the law side of the court in matters of this kind.

Karns vs. Imlay Rapid C. Process Co., 181 Fed. 751.

When it is recalled that the costs of Federal litigation are infinitely greater than those exacted from the litigant in the state court, when we are reminded that the fee bill in this jurisdiction still exacts from litigants double the amount exacted of litigants in other parts of the country, when we realize that the costs of an ordinary trial, including the mere clerical certification of documents for appellate review, amounts to sums substantially in excess of one hundred ($100) dollars, while the cost of printing for appellate purposes exceeds several hundreds of dollars, such a provision, if applied to the Federal Court, can hardly be regarded as an encouragement to litigate in that court. In this jurisdiction the requirement of security is often tantamount to a denial of the right of access to the Federal Court. In reality it is an impediment, an obstacle created by the state leg-

islature and given efficacy by its application to the Federal Court by the learned judge in supposed compliance with the demands of the Conformity Act. But if this be lawful, why was the statute of the State of Kansas, which provided for the recovery of attorneys' fees for services rendered in the prosecution of mandamus proceedings before the Supreme Court of the United States, held to be a clearly unauthorized impediment placed in the approach to that august tribunal which tended to deprive litigants of the exercise of their right of free access to our National courts? Mo. Pac. R. Co. vs. Larabee, 34 Sup. Court Rep. 979, 984.

That it has been customary is no response. Error, however long perpetuated, never becomes right.

We have been unable to find any case except those cited where the question was squarely presented for review.

It is presented here in part but not as to the provision relating to non-residents.

We, therefore, contend that paragraph 643 of the Arizona Code is in applicable to applications for security for costs on the law side of the Federal Court in Arizona, on the ground urged since, as we have shown, the right to security is statutory, and there is no Federal statute requiring the plaintiff to give such security, and the state statute is inapplicable for the reason stated.

It follows that the defendant's motion should

have been denied upon this ground. But assuming that the state statute is applicable to motions of this character on the law side of the Federal Court in Arizona, nevertheless, the order complained of was erroneous and should be reversed because the defendant was accorded the benefits of the state statute while the benefits of a part of the same statute were denied to the plaintiff.

We think the decision clearly unjust in either aspect of the case.

It presents an obvious discrimination between litigants which has no place in the administration of justice, and when it results from a particular construction of a statute affords a positive and convincing demonstration that such a construction is fundamentally erroneous.

For the reasons stated the judgment should be reversed with costs.

Respectfully submitted,

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